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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 159

PACIFIC COAST WHOLESALERS ASSOCIATION,
Petitioner,

vs.

CLOVER LEAF FREIGHT LINES, INC., INTERSTATE DISPATCH, INC., JOHN W. DEVANNEY and RALPH E. KINNEAR, co-partners, doing business under the name and style of MIDDLE STATES MOTOR FREIGHT, and ROCKFORD MOTOR SERVICE, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT
and
BRIEF IN SUPPORT THEREOF.

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Scheffer Printing Company, Del. 7171

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Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Pacific Coast Wholesalers Association, a corporation, respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit, to review the judgment entered by that court on January 14, 1948, reversing the judgment of the District Court setting aside default judgments against petitioner, quashing the Marshal's return of service of summons and dismissing the suit (R. 39).

Statement of the Matters Involved

This case involves the questions of venue and jurisdiction over a foreign corporation in a suit brought in a District Court of the United States to collect freight charges.

Respondents, four carriers engaged in interstate transportation of freight by motor vehicle, brought suit in the District Court of the United States for the Northern District of Illinois against petitioner seeking judgments for freight charges claimed to have been underpaid. Petitioner is a California non-profit corporation whose members comprise a number of industrial firms located on the west coast. Its principal office is in California. It has not applied for a license to do business in Illinois or appointed an agent there for service of process (R. 25). Its members issue instructions to their eastern and mid-western suppliers to consign less than carload shipments to petitioner in care of Transport Terminal Company at Chicago, Illinois (R. 26).

Transport Terminal is an Illinois corporation engaged in the business of consolidating, distributing, and forwarding freight for various shippers. It has a contract with petitioner, as well as with a number of other shippers, whereby it agrees to receive at its terminal in Chicago, freight arriving from various points consigned to petitioner or its members, to consolidate the shipments into carloads and to forward them to petitioner on the west coast. Transport Terminal charges petitioner a certain number of cents per hundred pounds for all freight handled. Less than one-half its volume of business is done with petitioner. It maintains its own offices in Chicago, pays all its own expenses, hires and directs its own employees and, through its officers and directors, has the sole direction and control of its business, including the method and means by which its contract with petitioner

is performed. It receives no money or compensation from petitioner other than the above charge for its services. There is no common ownership of the stock of the two corporations or any organizational connection between them, except that the manager of petitioner is also vice-president of Transport Terminal (R. 36-38).

Transport Terminal investigates, checks, revises and advances the freight charges for the shipments received and determines the charges to be paid by petitioner's members for its services. Petitioner's name appears in the Chicago telephone directories and on a sign over Transport Terminal's receiving dock (R. 27).

The summons was served on June 3, 1946, upon the president of Transport Terminal, Al Davis, the Marshal describing him as an agent of petitioner (R. 11). Petitioner having failed to appear within twenty days thereafter, default judgments aggregating approximately $7,000.00, were entered on July 1, 1946 (R. 15-17). Petitioner, on August 6, 1946, moved to vacate the judgments and dismiss the suit on the ground that the venue was improper and supported its motion by an affidavit showing that petitioner was a California corporation, that it was not licensed to do business in Illinois, that it had no agent there for the purpose of accepting service of process, and that it had not consented to be sued there (R. 24-25).

While this motion was pending, petitioner, by leave of court, amended it to object also to the jurisdiction over its person on the grounds that it was not subject to service of process in Illinois because it was not doing business there, and that Al Davis, upon whom the summons had been served, was not its officer, agent or employee (R. 33-35). Supporting affidavits were filed (R. 35-39).

The District Court sustained the motion as amended, vacated the judgments, quashed the return of service and dismissed the suit (R. 39). On appeal the Circuit Court of Appeals reversed this judgment (R. 48-59).

The Circuit Court of Appeals, on the question of jurisdiction, rested its decision on the opinion of this Court in *International Shoe Co.* v. *Washington,* 326 U. S. 310. To do so it went outside the record to make an erroneous assumption of a fact which it seemed to consider highly important. It assumed that this suit arose because Transport Terminal had reduced the amount of the freight charges demanded by respondents (R. 56), and reasoned that since those acts gave rise to the suit and occurred in Illinois the maintenance of the suit there did not offend "traditional notions of fair play and substantial justice." The fact is, however, as pointed out by petitioner in its petition for rehearing in the Circuit Court of Appeals (R. 63-64), that, except for occasional mathematical corrections, Transport Terminal did not reduce any freight bills but paid them as submitted by respondents, and that this lawsuit arises because respondents now claim they should have charged petitioner rates higher than those originally charged.

As to the validity of the service of summons on the president of Transport Terminal, who was not an officer, agent or employee of petitioner, the Circuit Court of Appeals, having concluded that petitioner was subject to service of process in Illinois because of the activities there of Transport Terminal, held that service on its president satisfied the requirements of the Federal Rules of Civil Procedure that service be made on an officer or agent of the defendant (R. 56-57).

With respect to the question of venue, the Circuit Court of Appeals, although agreeing with petitioner that the

venue was improper, nevertheless held that under the decision of this Court in *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.*, 278 U. S. 177, petitioner had waived the venue privilege by permitting default judgments to be entered (R. 59). The Court overruled petitioner's contention that this decision is outdated by, and inconsistent with, the Federal Rules of Civil Procedure and should therefore no longer be controlling.

Opinions Below

The opinion of the Circuit Court of Appeals appears in the Record at pages 48-59, and is reported in 166 F. 2d 626.

The District Court rendered an unreported oral decision.

Jurisdiction

The jurisdiction of this Court is invoked under section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U.S.C.A. sec. 347.

The judgment of the Circuit Court of Appeals was entered January 14, 1948 (R. 60). A petition for rehearing was filed January 29, 1948 (R. 61), and was denied April 19, 1948 (R. 73).

Questions Presented

1. May a foreign corporation engaged in the business of consolidating freight for its members be served with summons in a state where it is not licensed to do business and has no officers or employees but has a contract with an independent local corporation, similar to contracts which the latter has with others, under which the local corporation accepts freight consigned to the foreign corporation, reloads it into freight cars and re-consigns it to the foreign corporation, and performs incidental serv-

ices such as checking, revising and advancing the freight charges, the name of the foreign corporation appearing on a sign at the local corporation's receiving dock and in the local telephone directories?

2. If such a foreign corporation is subject to service of summons in the local state may the summons be served upon an officer of the local corporation who is not an officer, agent or employee of the foreign corporation?

3. May a Circuit Court of Appeals erroneously assume facts outside the record which assumed facts appear to be highly important to its decision whereby the judgment of the District Court is reversed?

4. Does the rule laid down in *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.*, 278 U. S. 177 (1929) that the venue privilege is waived by permitting default judgment to be entered, still obtain, despite the promulgation of the Federal Rules of Civil Procedure?

Reasons Relied on for Allowance of the Writ

The exercise of the discretionary power of this Court to grant the writ of certiorari is requested for the following reasons:

1. The decision of the Circuit Court of Appeals, that petitioner is subject to service of process in Illinois, is in conflict with a long line of decisions of this Court beginning with *Lafayette Insurance Co.* v. *French*, 18 How. 404 (1856) and continuing through *Consolidated Textile Corp.* v. *Gregory*, 289 U. S. 85 (1933), and particularly with the decisions in *Bank of America* v. *Whitney Central National Bank*, 261 U. S. 171 (1923) and *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333 (1925).

2. The decision of the Circuit Court of Appeals, that service of summons could be effected on petitioner by

serving the president of a local corporation who was neither officer, employee nor agent of petitioner, is in direct conflict with the decisions of this Court in *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364 (1907) and *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333 (1925), as well as with the Rules of Civil Procedure.

3. By departing from the record to erroneously assume that Transport Terminal had reduced the freight bills submitted and that such reductions gave rise to this suit, the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

4. The decision of the Circuit Court of Appeals, that the rule laid down in *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.*, 278 U. S. 177 (1929), is still controlling despite the promulgation of the Federal Rules of Civil Procedure, so that the venue privilege is waived by permitting default judgment to be entered, raises an important question of federal law which has not been, but should be, settled by this Court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in this cause.

PACIFIC COAST WHOLESALERS ASSOCIATION,
a corporation,

By: SAMUEL M. KANE,
MEYER J. MYER,
DAVID J. SHIPMAN,
Counsel for Petitioner.

.....

Chicago, Illinois,
July 14, 1948.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No.

PACIFIC COAST WHOLESALERS ASSOCIATION,
Petitioner,

vs.

CLOVER LEAF FREIGHT LINES, INC., INTERSTATE DISPATCH, INC., JOHN W. DEVANNEY and RALPH E. KINNEAR, co-partners, doing business under the name and style of MIDDLE STATES MOTOR FREIGHT, and ROCKFORD MOTOR SERVICE, INC.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I.

The Decision of the Circuit Court of Appeals that Petitioner Was Subject to Service of Process in Illinois Conflicts with a Long Line of Decisions of This Court.

This suit was instituted in a federal district court for the collection of alleged freight undercharges. The jurisdiction over the subject matter is founded by the complaint upon sec. 24 (8) of the Judicial Code, 28 U.S.C.A. sec. 41 (8) R.

3), which confers original jurisdiction on the district courts of the United States in suits arising under any law regulating commerce. There is no special statutory provision prescribing where summons shall be served in such an action. The question therefore presented is whether, under the decisions of this Court, the petitioner was subject to service of process in Illinois, or in other words, as it has sometimes been put, was the defendant "found", "present" or "doing business" in Illinois.

While it is undoubtedly true that each case in which this question arises must necessarily turn on its own facts, there would be little doubt, were it not for the opinion in *International Shoe Company* v. *Washington,* 326 U. S. 310 (1945), that the instant case is one in which the petitioner would be held not to be doing business in Illinois. *Bank of America* v. *Whitney Central National Bank,* 261 U. S. 171 (1923); *Cannon Mfg. Co.* v. *Cudahy Packing Co.,* 267 U. S. 333 (1925); and the unbroken line of decisions from *Lafayette Insurance Co.* v. *French,* 18 How. 404 (1856), to *Consolidated Textile Corp.* v. *Gregory,* 289 U. S. 85 (1933).

But the Circuit Court of Appeals felt that the *International Shoe* case required it to hold otherwise. In this, we submit, they were in error. The nub of that case, it seems to us, was that the State of Washington was attempting to enforce collection of unemployment contributions on the salaries paid to salesmen employed by the defendant in that state. We would readily agree that it would offend against traditional notions of justice and fair play to require the State of Washington to go elsewhere to enforce its rights. The instant case, however, is different. It is a private suit for the collection of alleged freight undercharges on shipments which moved from points in the east to Chicago. Two of the four plaintiffs are themselves

corporations foreign to Illinois (R. 2, 5, 6, 8). Petitioner has never had any employees in Illinois. Its sole contact with that state is a contract with a local corporation whereby the latter receives freight shipments consigned to it, consolidates them into freight cars and sends them on to petitioner on the west coast. The local corporation has similar arrangements with five other western concerns and is completely independent of the petitioner. It solicits and is ready to perform this same service for the general public. The only organizational connection between petitioner and the local corporation is that petitioner's manager is also vice-president of the latter (R. 37-38).

By erroneously assuming facts not in the record, the Circuit Court of Appeals thought that this case came within the orbit of the *International Shoe* case. It assumed that Transport Terminal reduced the freight bills submitted by respondents and that this suit resulted from such reductions (R. 56). Nowhere does this appear in the record. As petitioner pointed out in its petition for rehearing, the Circuit Court of Appeals apparently construed the word "revised" in Conlon's affidavit (R. 27) to mean "reduced", and then further assumed that this gave rise to this lawsuit. The fact is, however, that except for occasional mathematical corrections, no bills were reduced; and this suit arose because respondents concluded that they should have charged petitioner rates higher than those originally billed. See Petition for Rehearing (R. 63-64) and affidavit attached thereto (R. 66-67).

It would be futile to deny that the concept of what activities of a corporation will subject it to service of process in another state has undergone considerable extension since its first pronouncement. But it has not been extended to the point where a corporation which merely has a con-

tract with a local corporation such as is here involved thereby becomes subject to service of process in the local state. Nor do we believe that orderly judicial administration in a federated government demands that result. The decision of the Circuit Court of Appeals is in conflict with the decisions of this Court and should be reviewed.

II.

Petitioner Was Not Validly Served with Summons because the Person on Whom the Summons Was Served Was Not Its Officer or Agent.

The Marshal's return of the summons reads:

> "Served this writ together with copy of Complaint on the within named Pacific Coast Wholesalers Association, a corporation, by delivering copies thereof to Al Davis, an agent of said corporation, this 3rd day of June, A. D. 1946. The President of said corporation not found in my district." (R. 11.)

Al Davis was the president of Transport Terminal and was not an officer, agent or employee of petitioner (R. 38).

According to the Federal Rules of Civil Procedure, Rule 4 (d) subsections 3 and 7, and reading into them section 17 of the Illinois Civil Practice Act (Ill. Rev. Stat. 1947, Ch. 110, sec. 141) as they require, it is uncontroverted that a domestic or foreign corporation may be served with summons only by delivering the summons to an officer or agent of the corporation.

The Circuit Court of Appeals in upholding the validity of the service said that since Transport Terminal was petitioner's agent, it followed that service upon Transport Terminal's president was service upon petitioner (R. 57). This holding is contrary to the decisions of this Court in *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205

U. S. 364 (1907) and *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333 (1925). In those cases, it was held that service upon an officer of the local corporation (*Peterson* case) or upon an agent of the local corporation (*Cannon* case) is not good service upon the foreign corporation.

Even if the Circuit Court of Appeals were correct in holding that Transport Terminal was petitioner's agent for the purpose of ascertaining whether petitioner was doing business in Illinois, it would not follow that Transport Terminal's officers and agents thereby became petitioner's agents for the purpose of service of process. To equate one to the other violates long established and accepted concepts of the nature and incidence of the relationship of principal and agent. In doing so the Circuit Court of Appeals was in error. The order of the District Court setting aside the Marshal's return of service was correct.

III.

The Holding of the Circuit Court of Appeals That Its Decision is Controlled by Commercial Casualty Insurance Co. v. Consolidated Stone Co., Despite the Promulgation of the Federal Rules of Civil Procedure, so That the Venue Privilege Was Waived by Permitting Default Judgment to Be Entered, Raises an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by This Court.

The venue in this case is fixed by section 51 of the Judicial Code, 28 U.S.C.A. sec. 112, the district of which petitioner is an inhabitant. The Circuit Court of Appeals conceded that since petitioner was not an Illinois corporation and had not designated an agent there for service of process it was not an inhabitant of that state and that the venue was therefore improperly laid there (R. 57). It concluded, however, that petitioner had

waived its venue privilege by suffering default judgments to be entered against it. This conclusion was based on the supposed controlling effect of *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.*, 278 U. S. 177 (1929). Whether that decision is controlling since the promulgation of the Federal Rules of Civil Procedure is an important question which this Court should settle.

The *Commercial Casualty* case was an action at law brought in a federal District Court in Ohio on grounds of diversity of citizenship. This Court held, in response to a question certified to it, that defendant had waived its venue privilege by permitting a default judgment to be entered. But that case was decided in 1929 before the Federal Rules of Civil Procedure had been promulgated. The waiver there was spelled out of the requirements of Ohio state court procedure which, under the Conformity Acts (17 Stat. 197, 28 U.S.C.A. sec. 724), determined the procedure in the District Court. The Court said:

> "The Ohio practice statute prescribes that all objections thus appearing when so neglected shall be deemed to have been waived * * *." (p. 180.)
>
> * * * * *
>
> "Our conclusion is that the objection was not seasonably made and therefore that under our decisions, as also the Ohio statute, it was waived." (p. 181.)

With the issuance of the new rules a simplified, direct and liberalized system of procedure was provided in the Federal courts. Formal distinctions between various types of pleas were largely abolished. By Rule 12 (b) it was provided that all defenses, including venue, may, if desired, be pleaded at the same time. Thus, objection to the venue may be raised simultaneously with, and in the same responsive pleading as, a defense to the merits. Both stand on

the same footing with respect to the time when they may or should be asserted. Failure to assert the one at the proper time is no more or less a waiver than failure to assert the other.

Rule 60 (b) permits the court to vacate judgments taken against a defendant through his mistake, inadvertence, surprise or excusable neglect, provided the motion is made within a reasonable time. The meaning and design of these two rules seems to be that a court may exercise its discretion to vacate a default judgment within the proper time under Rule 60 (b) and upon so doing the defendant is entitled to interpose any of the defenses permitted under Rule 12 (b) in his first responsive pleading. This includes the defense of improper venue. With such meaning and design the holding in the *Commercial Casualty* case is inconsistent. It should therefore no longer be considered as controlling and the decision of the Circuit Court of Appeals to the contrary should be reviewed.

Respectfully submitted,

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Attorneys for Petitioner.

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Respondents.

RESPONDENTS' REPLY TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

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Respondents.

RESPONDENTS' REPLY TO THE PETITION FOR WRIT OF CERTIORARI AND SUPPORTING BRIEF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondents will treat the petition for certiorari and supporting brief in sections and paragraphs identified by words or figures used in the petition for certiorari and in the supporting brief.

STATEMENT OF MATTERS INVOLVED.
(Petition, page 2.)

Petitioner's statement, while stressing the alleged independence existing between Transport Terminal Co. and the petitioner, gives but an imperfect picture of the scope and duration of the activities carried on by the Transport Terminal Co. in this District.

The additional facts are these. Respondents are common carriers of property by motor vehicle and are subject to the terms and provisions of the Interstate Commerce Act, Part II (U. S. C. A. Title 49, Sections 301-327), (R. 3, 5, 7, 8). From September 15, 1942 to December 13, 1945, the less carload (or less truckload) shipments involved in this case moved from various sources of supply in the East and Middle West under uniform standard bills of lading and were consigned to the petitioner in the care of Transport Terminal Co. at Chicago, Illinois (R. 3, 5, 7, 8, 25).

The facilities at which these shipments were delivered are operated by Transport Terminal Co. and at the time deliveries were made, the shipments were accepted and receipted for by "Transport Terminal, Agent for Pacific Coast Wholesalers Association." After their arrival at Chicago, they were loaded and shipped as consolidated carload shipments in railroad cars by the Transport Terminal Co. to Pacific Coast Wholesalers Association at various Pacific Coast destinations (R. 26, 27).

Transport Terminal investigated, checked, revised and paid the freight charges which the respondents, as well as all other carriers, rail, motor carrier or freight forwarder, claimed to be due on the respective movement from actual origin to point of delivery at Chicago under their published

tariff rates, and was subsequently reimbursed by the petitioner for the charges expended by Transport Terminal on its behalf. Transport Terminal also ascertained the charges which were to be paid by the individual members comprising petitioner's Association for the services performed in the handling and movements of each member's individual shipments (R. 26, 27, 37).

Transport Terminal, an Illinois corporation, was organized in 1942. Petitioner asserts that there is no common stock ownership existing as between the corporations and, despite the fact that Gus A. Olson, the general manager of petitioner, is also vice president of Transport Terminal Co., petitioner has not divulged the salary, if any, which Transport Terminal pays to Olson, nor have any facts been submitted to indicate the extent of his influence in the management of Transport Terminal.

Transport Terminal and petitioner operate under a contractual arrangement whereby Transport Terminal is paid a certain number of cents per hundred pounds for shipments handled by Transport Terminal for the petitioner, but the exact terms and conditions of this agreement have never been divulged.

This suit was instituted on May 14, 1946. On April 12, 1946, respondents' attorney notified petitioner's attorney that a lawsuit involving an issue with which the petitioner and its attorney were familiar would be instituted not later than April 25, 1946. Action was postponed in accordance with the advice given petitioner's attorney (R. 28-32). After Mr. Davis, president of Transport Terminal was served, he presumably forwarded the summons and complaint to Mr. Sol Smith, secretary of the petitioner, who received them on June 10, 1946, or fourteen days prior to the time allowed for filing of its answer (R. 35). Mr. Smith stated that he then engaged the services of a Chicago attorney but makes no mention of the date. He merely said that he was

not informed of the entry of the default judgments until July 12, 1946. It was not until August 6 that the original motion based on defense of improper venue was filed. Thus a period of almost two months elapsed between the time petitioner received the complaint and the time motion was filed.

Jurisdiction.

(Petition, page 5.)

The statements as to jurisdiction appear to be correct.

Questions Presented.

(Petition, page 5.)

None of the four questions listed in the petition for certiorari presents a question of law requiring disposition by this Court:

Question 1: The Circuit Court of Appeals did not decide the case solely upon the statements of fact contained in petitioner's question. It also considered the substantial, continuous and systematic nature of the business carried on in Illinois by the petitioner, through Transport Terminal's services, plus the additional fact that the underpayments of the freight charges were made by Transport Terminal.

Question 2: This again is a question of fact. Having found that the corporate agent's activities amounted to "presence" of the petitioner, the Circuit Court of Appeals correctly reasoned that the foreign corporation may not avoid service merely because the agent is a local corporation instead of an individual.

Question 3: The Circuit Court did not assume facts not in the record. Rather than this, petitioner improperly attempted to inject additional facts after the case had been

appealed, by not only discussing the merits of the case in its petition for rehearing, but attaching thereto an additional affidavit of Alfred D. Davis (R. 63-68).

Question 4: Petitioner here attempts to raise a question which has been settled by this Court since the establishment of the Federal Rules of Civil Procedure. The Circuit Court of Appeals correctly relied upon the decisions of the Court in its reference to *Industrial Assn.* v. *Commissioner,* 323 U. S. 310 and *Freeman* v. *Bee Machine Co.,* 319 U. S. 448.

Reasons Relied on for Allowance of the Writ.

(Petition, page 6.)

Rule 38, paragraph 5 (b) of this Court sets forth four reasons which, while not all inclusive, will be considered as grounds for granting a petition for certiorari. Petitioner submits four reasons, not one of which indicates why the merits of this case should be re-argued for the third time.

Reason 1: The decision of the Cricuit Court of Appeals does not conflict with any of the cases cited by petitioner. On the contrary, it is in direct conformity with the principles laid down by this Court in *International Harvester* v. *Kentucky,* 234 U. S. 579 and continuing through *International Shoe Co.* v. *Washington,* 326 U. S. 310.

Reason 2: Petitioner's claim that the decision of the Circuit Court of Appeals conflicts with *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.,* 205 U. S. 364, and *Cannon Mfg. Co.* v. *Cudahy Packing Co.,* 267 U. S. 333, is not well founded for the reason that in these cases, the Court held that the activities of the subsidiary organizations were not sufficient to justify finding that the parent was judicially present within the State. Obviously, if the principal is not present through its agent, its agent cannot be validly served.

Reason 3: The Transport Terminal Co. "investigated,

checked and revised" (R. 26) these charges. It must of necessity have arrived at a conscious determination of their correctness. By remitting charges lower than the published tariff level, it actually "reduced" its payments. It is not the manipulation of figures upon a freight bill which is determinative of the question, but the act of payment itself.

Reason 4: The promulgation of the Federal Rules of Civil Procedure does not affect *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.*, 278 U. S. 177. Rule 82 specifically provides that the Rules shall not be construed so as to limit or extend the power of the Courts in matters of venue. Rule 12 (b) and (h) actually incorporate the principle expressed in the *Commercial Casualty* case. Petitioner's question presents no new application of legal principles but attempts to reopen a question already well settled.

In conclusion, the essential problem herein is strictly factual in that the scope, duration, and activities of the Illinois corporation are measured to ascertain whether or not the petitioner is actually "present" or doing business in the State.

BRIEF.

I.

The Decision of the Circuit Court of Appeals That Petitioner Was Subject to Service of Process in Illinois Conflicts With a Long Line of Decisions of This Court.

(Petition, page 9.)

In its argument under this point, petitioner omits any reference to the activities of Transport Terminal, but is content to emphasize the alleged independence of the two corporations. Presumably because of its claimed independence, it urges that the Circuit Court of Appeals has overextended *International Shoe Co.* v. *Washington,* 326 U. S. 310, by holding in substance that the mere existence of a contract between the two corporations is sufficient to invoke the doctrine of that decision.

Petitioner, however, in stating that "there would be little doubt" except for the opinion of the *International Shoe Co.* v. *Washington,* 326 U. S. 310, bases its statement upon cases which hold that presence—and that alone—of the agent does not amount to "presence" of the principal. They do not apply in situations where the activities of the agent are continuous, systematic and are the cause of the liabilities sued upon. This distinction was quite forcibly made by this Court in the *Cannon* case when it said:

> "There is here no attempt to hold the defendant liable for an act or omission of its subsidiary, or to enforce as against the latter, a liability of the defendant." (Page 337.)

To the same effect is *Inductrial Research Corp.* v. *General Motors Corp.,* 29 F. 2d., 623, 626.

Where the activities of the subsidiary are systematic, continuous, substantial, and are the cause of the liabilities sued upon, this Court has been consistent in finding that the principal is present within the jurisdiction. In the *International Shoe* case, this Court rationalized the "presence" theory and summarized in one statement the long line of previous decisions which had undertaken to define "presence" as applicable to personal jurisdiction. It said at page 317:

> " 'Presence' in the State in this sense has not been doubted when the activities of the corporation there have been not only continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given" (citing numerous cases).

Moreover, for perhaps the first time in jurisdictional cases, the Court supplied an affirmative standard for guidance when, in speaking of the activities which the Courts will consider sufficient to satisfy the demands of due process, the Court said further at page 317:

> "Those demands may be met by such contacts of the corporation with the State of the forum as to make it reasonable, in the context of our Federal system of government to require the corporation to defend the particular suit which is brought there."

In this case the importance of Transport Terminal's operations in the conduct of petitioner's business is abundantly clear and was commented on by the Circuit Court of Appeals (R. 54, 55). Plainly they were far more substantial in character than those described in *International Harvester Co.* v. *Kentucky,* 234 U. S. 579; *St. Louis S. W. Ry.* v. *Alexander,* 227 U. S. 218, and *International Shoe Co.* v. *Washington,* 326 U. S. 310.

Petitioner also stresses the Circuit Court of Appeals'

use of the word "reduce" in referring to the underpayments made by Transport Terminal Co. immediately after the time of delivery. It maintains that the word "reduce" is not coextensive in meaning with the word "revise". By the improper submission of an affidavit attached to its petition for rehearing, it would have the Court believe that there had been no mathematical reduction accomplished at the time of payment. Actually, Transport Terminal Co. independently investigated and checked each bill as paid. Upon acceptance of the freight at the Chicago receiving facilities, the petitioner became liable for proper tariff charges, *P. C. C. & St. L.* v. *Fink*, 250 U. S. 577. Moreover, it was charged with the statutory duty of paying the correct charges. Whether or not it altered or allowed the original bills as submitted to remain unchanged is unimportant; its conscious act in paying charges lower than tariff rates was the cause of the institution of these proceedings.

The decision, therefore, of the Circuit Court of Appeals was eminently fair and reasonable. It is factual in nature and gives rise to no question calling for determination by this Court.

II.

Petitioner Was Not Validly Served With Summons Because the Person on Whom the Summons Was Served Was Not Its Officer or Agent.

(Petition, page 12.)

Petitioner maintains that the decision of the Circuit Court of Appeals upholding the validity of service upon Davis is contrary to the decisions of the Court in *Peterson* v. *Chicago, Rock Island & Pacific Ry. Co.*, 205 U. S. 364, and *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U. S. 333.

Such is not the case. In both decisions, this Court held

that the principal was not doing business in the district where the suit was brought. Obviously, if the defendant is not present in the district, there exists no person upon whom service may be had. Conversely, no problem of this nature is presented when the principal is "present". It has been so held in *In Re Hohorst,* 150 U. S. 663, and in *Blum* v. *Postal Telegraph, Inc.,* 54 Supp. 899-900.

Petitioner further maintains that even though Transport Terminal was petitioner's agent, it would not follow that Transport Terminal's officers thereby became petitioner's agents for the purpose of service of process. If this were true it would only be necessary for a foreign corporation to incorporate its agent and thereby escape the consequences of its acts. The reasoning employed by the Circuit Court of Appeals was correct.

III.

The Holding of the Circuit Court of Appeals That Its Decision Is Controlled by Commercial Casualty Insurance Co. v. Consolidated Stone Co., Despite the Promulgation of the Federal Rules of Civil Procedure, So That the Venue Privilege Was Waived by Permitting Default Judgment to Be Entered, Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

(Petition, page 13.)

To support its contention under this point, petitioner attempts to nullify *Commercial Casualty Insurance Co.* v. *Consolidated Stone Co.,* 278 U. S. 177 by showing that under Rule 12 (b) the defense of venue may now be joined with a defense to the merits, a practice which did not exist at the time the *Commercial Casualty* case was decided. Respondents agree that both defenses are on the same footing from the standpoint of the time when they should be

asserted. The defense of venue must now be raised not later than the time required for the filing of an answer to the merits. Thus, Rule 12 (b) and Rule 12 (h) which provides that all defenses not presented are considered waived, specifically incorporate the holding of this Court in the *Commercial Casualty* case.

In the original proceedings petitioner made no attempt to invoke the application of Rule 60 (b) and respondents can perceive no reason why reference should be made to it at this time. Moreover, petitioner's assertion that any defense including venue could be interposed after vacation of judgment under Rule 60 (b) is directly contrary to *Orange Theatre Corp.* v. *Rayhertz Amusement Co.*, 130 F. 2d. 185 and its companion case, *Orange Theatre Corp.* v. *Rayhertz Amusement Corp.*, 139 F. 2d. 871.

Respectfully submitted,

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By .....